

Federal Communications Commission

DA 98-2238

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Federal-State Joint Board on)
Universal Service)
)
United Native American)
Telecommunications, Inc.)
Request for Waiver)

CC Docket No. 96-45

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1998

Released: November 4, 1998

By the Deputy Chief, Common Carrier Bureau:

1. On May 14, 1998, United Native American Telecommunications, Inc. (UNAT) filed with the Commission a request for waiver of the requirement to contribute to the universal service support mechanisms¹ because UNAT collects 98.68 percent of its private-line revenue from telecommunications service that UNAT provides to the U.S. government. For the reasons discussed below, we deny UNAT's Request.

I. BACKGROUND

2. The Statute and Rules. In the Telecommunications Act of 1996 (1996 Act),² Congress amended the Communications Act of 1934 (Act)³ by, among other things, adding section 254 to the Act. Section 254(b) states that, "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service,"⁴ through "specific, predictable and sufficient Federal and

¹ United Native American Telecommunications, Inc. Request for Waiver, DA 98-949 (filed May 14, 1998) (Request).

² Pub. L. No. 104-104, 110 Stat. 56.

³ 47 U.S.C. §§ 151, *et seq.* Hereinafter, all citations to the 1996 Act and the Act will be to the relevant section of the United States Code unless otherwise noted.

⁴ 47 U.S.C. § 254(b)(4).

State mechanisms."⁵ To accomplish these goals, the Act mandates that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."⁶ The statute defines the term "telecommunications carrier" as "any provider of telecommunications services,"⁷ and the term "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."⁸ Section 254(d) provides, that in addition to these "mandatory contributors," the Commission may require "[a]ny other provider of interstate telecommunications" to contribute to universal service, "if the public interest so requires."⁹ The Act authorizes the Commission to exempt a mandatory contributor from contributing to the universal service support mechanisms only "if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be *de minimis*."¹⁰ The statute did not similarly restrict the Commission's ability to exempt "other providers of telecommunications service."

3. On May 8, 1997, the Commission released the *Universal Service Order* implementing section 254 of the Act.¹¹ The resulting Commission rules require all

⁵ 47 U.S.C. § 254(b)(5).

⁶ 47 U.S.C. § 254(d).

⁷ 47 U.S.C. § 153(44).

⁸ 47 U.S.C. § 153(46).

⁹ 47 U.S.C. § 254(d).

¹⁰ 47 U.S.C. § 254(d).

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service, Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *consolidated appeal pending sub nom Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); *Federal-State Joint Board on Universal Service*, Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); *Changes to the Board of Directors of the National Exchange Carrier Association Inc.*, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997), as corrected by *Federal-State Joint Board on Universal Service, Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); *Changes to the Board of Directors of the National Exchange Carrier Association Inc.*, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12444 (1997); *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-160, Third Report and Order,

telecommunications carriers providing interstate telecommunications service to contribute to universal service.¹² They also specifically identify resellers of interstate services as mandatory contributors.¹³ Pursuant to the authority granted it by section 254(d), the Commission required "other providers of interstate telecommunications" (*i.e.*, providers of interstate telecommunications that offer interstate telecommunications for a fee on a non-common carrier basis, and payphone providers that are aggregators) to contribute to universal service.¹⁴

4. Pursuant to the authority to exempt mandatory contributors whose contributions would be *de minimis*, the Commission exempted from the contribution requirement all entities whose annual contribution would be less than \$10,000.¹⁵ In addition, with respect to "other providers of telecommunications service," the Commission exempted those entities that provide interstate telecommunications exclusively to the government.¹⁶ Specifically, paragraph 800 of the *Universal Service Order* states:

government entities that purchase telecommunications services in bulk on behalf of themselves. . . will not be considered "other providers of telecommunications" that will be required to

12 FCC Rcd 22485 (1997), as corrected by *Federal-State Joint Board on Universal Service, Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 97-21, Report and Order and Second Order on Reconsideration in CC Docket 97-21, 12 FCC Rcd 22423 (1997); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-24, Third Order on Reconsideration, 12 FCC Rcd 22801 (1997); *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997) (*Fourth Reconsideration Order*), as corrected by *Federal-State Joint Board on Universal Service, Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998), *appeal pending in Alenco Communications, Inc., et al. v. FCC and USA*, No. 98-60213 (5th Cir. 1998); *Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, FCC 98-120 (rel. June 22, 1998); *Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, CC Docket No. 96-45, FCC 98-160 (rel. July 17, 1998).

¹² 47 C.F.R. § 54.703.

¹³ *Id.*

¹⁴ *Id.*; see *Universal Service Order*, 12 FCC Rcd at 9183, para. 794.

¹⁵ *Universal Service Order*, 12 FCC Rcd at 9186, para. 801; 47 C.F.R. § 54.705. The Commission's rule exempts both "mandatory contributors" and "other providers of telecommunications service" from the requirement to contribute to universal service in any year in which the carrier's contribution is less than \$10,000. *Id.*

¹⁶ *Universal Service Order*, 12 FCC Rcd at 9186, para. 800.

contribute. Such government entities would be purchasing services for local or state governments or related agencies. Therefore, we find that such government agencies serve only their internal needs and should not be required to contribute. . . . Similarly, if an entity exclusively provides interstate telecommunications to public safety or government entities and does not offer services to others, that entity will not be required to contribute.¹⁷

5. UNAT's Petition. UNAT describes itself as an aggregator and reseller of "private-line" circuits to the federal government.¹⁸ UNAT, thus, is a telecommunications carrier that provides interstate telecommunications service, and, therefore, pursuant to the Act, is a mandatory contributor to the universal service support mechanisms.¹⁹ UNAT indicates that it also has one commercial customer.²⁰ UNAT reports that during the first six months of 1997, its interstate telecommunications service revenues averaged \$424,025 per month, and only about \$5,585 (or 1.32 percent) of its averaged monthly revenues is derived from interstate telecommunications service provided to UNAT's one commercial customer.²¹ UNAT calculates that its monthly contribution to universal service, based upon all of its interstate telecommunications service end-user revenues, would be approximately \$14,821, or more than double the amount of the revenues it receives from providing service to its one commercial customer.²² As a result, on May 14, 1998, UNAT filed with the Commission a request that the Commission permanently waive, in its entirety, the requirement for UNAT to contribute to the universal service support mechanisms.²³

6. UNAT maintains that the Commission should grant its request for a waiver because UNAT collects 98.68 percent of its private-line revenue from telecommunications service that UNAT provides to the federal government, and there is a possibility that UNAT

¹⁷ *Id.*

¹⁸ Request at 1.

¹⁹ 47 C.F.R. 54.703; 47 U.S.C § 254(d).

²⁰ Request at 1.

²¹ *Id.*

²² *Id.*

²³ *Id.*

will not be able to recover these charges from the federal government.²⁴ Specifically, UNAT contends that the Commission should permit UNAT to exclude from the calculation base all of the revenue that UNAT receives from the government, and thus enable UNAT to qualify for the *de minimis* exemption.²⁵ UNAT also maintains that a waiver is warranted because, but for the revenue that UNAT receives from its one commercial customer, UNAT would qualify for the "government exemption."²⁶ Finally, UNAT argues that, in the alternative, the Commission should require the government to reimburse UNAT for UNAT's contribution to universal service.²⁷

7. The Commission issued a public notice seeking comments on UNAT's request.²⁸ AT&T Corporation (AT&T) responded with comments opposing it,²⁹ and UNAT filed comments in reply.³⁰ In its reply, UNAT argues that UNAT's ability to recover its contribution to the universal service support mechanism may be further reduced by the fact that the Commission's rules require UNAT to contribute based upon prior year revenues.³¹

II. DISCUSSION

8. Generally the Commission's rules may be waived for good cause shown.³² But, as noted by the Court of Appeals for the D.C. Circuit, agency rules are presumed valid, and

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Request at 2.

²⁸ *United Native American Telecommunications, Inc. Request for Waiver*, Public Notice, DA 98-949 (Accounting Policy Division rel. May 19, 1998) (*Public Notice*).

²⁹ Opposition of AT&T Corporation (filed June 2, 1998) (AT&T Opposition).

³⁰ Reply Comments to Opposition of AT&T Corp. and Request for Extension of Filing Date for Reply Comments (filed June 17, 1998) (Reply). Although the UNAT Reply was received after the due dates established by the Commission in the *Public Notice*, in the interest of establishing a complete record, and because this Petition is being addressed in a permit-but-disclose proceeding in which *ex parte* communications are permitted subject to disclosure, we considered all submissions. See *Public Notice* at 2; 47 C.F.R. § 1.1206.

³¹ Reply at 4.

³² 47 C.F.R. § 1.3.

"an applicant for waiver faces a high hurdle even at the starting gate."³³ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.³⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³⁵ Waiver is, therefore, appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.³⁶ As further discussed below, we conclude that UNAT has failed to justify grant of a waiver.

9. UNAT claims that it should not have to contribute to universal service because it qualifies for the *de minimis* exemption.³⁷ UNAT acknowledges, however, that it can only qualify for the *de minimis* exemption if the Commission agrees to exclude the revenue from UNAT's government customers.³⁸ UNAT claims that the Commission should permit UNAT to exclude from the calculation base all of the revenue that UNAT receives from its contracts for service to the government, because there is a possibility that UNAT will not be able to recover the contributions based thereon from its government customers.³⁹ According to UNAT, its contracts with the government are exempt from the requirements to pay taxes and contribute to universal service.⁴⁰ UNAT's position is based upon a letter from one of its government agency customers, the Defense Information Systems Agency, Defense Information Technology Contracting Organization (DITCO),⁴¹ and on UNAT's interpretation of paragraph

³³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

³⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁵ *WAIT Radio supra* at 1157.

³⁶ *Northeast Cellular supra* at 1166.

³⁷ Request at 1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Reply at Exhibit 1. According to the letter from DITCO, DITCO has not yet determined whether any, or all of the charges for universal service passed through from its contractors are appropriate. Reply at Exhibit 1. DITCO concludes, therefore, that it will pay the charges under protest, and with reservation of the right to recoup the payments from its contractors. *Id.*

800 of the *Universal Service Order*.⁴²

10. UNAT contends that, absent a waiver, "the burden of collecting or recovering the costs [will be] on the 'sole' commercial customer or outside of a contract negotiated in a prior period," and neither it nor its sole commercial customer should have to bear the cost of contributing on the basis of revenues that UNAT receives from the government.⁴³ Additionally, UNAT argues in its reply that, because the Commission's rules require UNAT to contribute to the universal service support mechanism based upon prior year revenues, UNAT may not be able to recover its contributions from its current customers.⁴⁴ According to UNAT, "[t]he current customers are carrying the load if the revenues decrease or [sic] otherwise reaping the benefits of an increase in revenue and the change in charges or lack thereof."⁴⁵

11. AT&T responds that, if UNAT is exempted from the requirement to contribute on the basis of all of its interstate telecommunications service end-user revenues, the burden of UNAT's obligations will fall on all other carriers contributing to the support mechanisms, as their contributions will increase to compensate for the reduction.⁴⁶ In AT&T's view, this result would be contrary to the public interest, and the principle of competitive neutrality.⁴⁷

12. Pursuant to section 254, the rules established in the *Universal Service Order* provide for the *de minimis* exemption as the only basis upon which the Commission may exempt a mandatory contributor.⁴⁸ We believe that the legislative history of section 254(d) evidences a Congressional intent that this exemption be narrowly construed.⁴⁹ The *de minimis* exemption allows a "mandatory contributor" to forego contributions when in any given year its contribution is less than \$10,000.⁵⁰ UNAT is a mandatory contributor.⁵¹ The anticipated

⁴² Request at 2.

⁴³ *Id.*

⁴⁴ Reply at 4.

⁴⁵ *Id.*

⁴⁶ Opposition of AT&T at 6.

⁴⁷ *Id.*

⁴⁸ *Universal Service Order*, 12 FCC Rcd at 9188, para. 804; 47 C.F.R. § 54.705.

⁴⁹ *Universal Service Order*, 12 FCC Rcd at 9187, para. 802.

⁵⁰ 47 C.F.R. § 54.705.

amount of UNAT's contribution based upon all of its private-line telecommunications service end-user revenues (\$14,821 per month) is more than the *de minimis* threshold.⁵² Accordingly, we conclude that UNAT does not qualify for the *de minimis* exemption without special treatment.

13. In addition, we are not persuaded that we should exclude the majority of UNAT's telecommunications service end-user revenues, which would enable UNAT to qualify for the *de minimis* exemption. As noted, UNAT claims that excluding those revenues is appropriate because it has no means of recouping the cost of its contributions thereon. Although the Commission's rules permit carriers to pass through all or part of their universal service contributions to their end-users in customer bills, the requirement to contribute is not dependent upon a carrier's ability successfully to do so.⁵³ The Commission's rules are intended to carry out the statutory mandate that every telecommunications carrier that provides interstate telecommunications service "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."⁵⁴ Accepting the argument that the Commission should not count revenue from end-users who are not willing to pay the charges for universal service passed through to them by the carrier, would appear to be inconsistent with the statutory requirement that every telecommunications carrier that provides interstate telecommunications contribute to the universal service support mechanisms. We also reject the argument that UNAT should be given special treatment because UNAT may not be able to recover fully contributions based upon prior year revenues. The Commission's rules are clear that UNAT's contribution to universal service is not to be limited to the amount it can pass through to its end-users.⁵⁵ We find no special circumstance here justifying waiver of the Commission's rules. We also find no basis for granting the alternative request that the Commission require UNAT's government customers to pay the pass-through charges.⁵⁶

⁵¹ Request at 1.

⁵² *Id.*

⁵³ See *Universal Service Order*, 12 FCC Rcd at 9210-12, paras. 853-857.

⁵⁴ 47 U.S.C. § 254(d).

⁵⁵ *Universal Service Order*, 12 FCC Rcd at 9210-12, paras. 853-857; 47 C.F.R. § 54.709.

⁵⁶ In any event, we do not perceive any significant adverse consequences to UNAT or the public in enforcing the requirements of section 54.703 of the Commission's rules in this situation. We are not convinced that UNAT has no means of minimizing the impact of the contributions on its working capital. It is not clear to us, nor apparently to DITCO, that DITCO is not liable to pay UNAT for these charges under existing contracts. See footnote 40. In addition, as we noted in the *Universal Service Order*, we recognize that by assessing a new contribution requirement, we created an expense or cost of doing business that the carriers did not anticipate at

14. Finally, we also reject UNAT's contention that, because so little of its telecommunications service end-user revenues are derived from its one commercial customer, it should be considered an entity that exclusively provides interstate telecommunications service to the government.⁵⁷ We agree with AT&T that UNAT is not eligible for the "government exemption," because that exemption is only available to "other providers of interstate telecommunications," and UNAT is not an "other provider of interstate telecommunications."⁵⁸ Paragraph 800 of the *Universal Service Order*, cited by UNAT in support of its position,⁵⁹ explains that the "government exemption" is for "other providers of telecommunications," and is based upon the finding that such government agencies and their agents serve only the government's internal needs.⁶⁰ There is no dispute that UNAT is an interstate telecommunications service carrier, and as such must be treated as a mandatory contributor. Moreover, it is clear that UNAT is not a government entity that is either purchasing for, or providing services solely to, the government.⁶¹ Accordingly, we reject the UNAT argument that the Commission should consider it an entity that exclusively provides interstate telecommunications service to the government.

15. Based upon the foregoing, we conclude that UNAT does not meet the requirements for a waiver, and UNAT must contribute to the universal service support mechanisms on the same basis as all other telecommunications carriers.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, the Request for Waiver, filed May 14, 1998, by United Native American Telecommunications, IS DENIED.

the time they entered into many contracts. *Universal Service Order*, 12 FCC Rcd at 9209, para. 851. We, thus, found that it would serve the public interest to allow telecommunications carriers and providers to make changes to existing contracts for service in order to adjust for this new cost of doing business. *Id.*

⁵⁷ Request at 2.

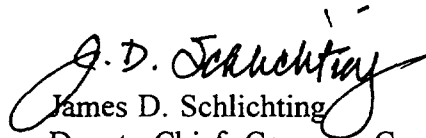
⁵⁸ AT&T Opposition at 3. AT&T also argues that UNAT does not meet the requirements for qualification for the exemption, because UNAT is neither purchasing services on behalf of, nor providing services exclusively, to the government. AT&T Opposition at 4.

⁵⁹ Request at 2.

⁶⁰ *Universal Service Order*, 12 FCC Rcd at 9186, para. 800.

⁶¹ See para. 4 *supra*.

17. IT IS FURTHER ORDERED that the petitioner's request to receive an extension of time to file reply comments is GRANTED.


James D. Schlichting
Deputy Chief, Common Carrier Bureau